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Supreme Court of the United States

OCTOBER TERM, 1953

No. 274

COMMERCIAL PICTURES CORPORATION,
Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF APPELLANT

FLORENCE PERLOW SHIENTAG,
Attorney for Appellant,
19 East 53rd Street,
New York 22, N. Y.

FLORENCE PERLOW SHIENTAG,
PHILIP J. O'BRIEN, JR.,
ROSE M. TRAPANI,
Of Counsel.

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF APPELLANT

Opinions Below

The concurring and dissenting Opinions of the Court of Appeals of the State of New York appear at R 56 and are reported at 305 N. Y. 336.

The Opinions of the Appellate Division of the State of New York for the Third Judicial Department appear at R 48 and are reported in 280 App. Div. 260.

Jurisdiction

Jurisdiction of this Court is invoked under 28 United States Code 1257 (2). The judgment of the Court of Appeals of the State of New York was entered May 28, 1953. Application for appeal to this Court was made

August 8, 1953, and probable jurisdiction was noted by this Court October 26, 1953.

Statement of the Case

Commercial Pictures Corporation, the appellant, is the sole owner of the distribution rights in the United States of a French-language motion picture film with English subtitles, produced in France in 1950, entitled "La Ronde". The film is part of the Record on Appeal.

Pursuant to Sections 120 and 122 of the New York State Education Law, appellant applied to the Director of the Motion Picture Division of the New York State Education Department for a license to exhibit the motion picture "La Ronde" in the State of New York. That application was denied and a license refused on April 4, 1951, on the ground that the picture was "immoral" and "would tend to corrupt morals" within the meaning of Section 122 of the Education Law (R 7). The picture was then edited and resubmitted, and on April 13, 1951 a license was again refused in the words of the statute and with no findings of fact (R 7).

In accordance with Section 124 of the Education Law, appellant thereupon appealed to the Board of Regents of the State of New York. That Body, acting through a committee of three members, by order dated May 25, 1951, dismissed the appeal, stating:

> "The picture presents a chain of loosely related sequences, each dealing with the amorous adventures of various characters, one partner in each escapade becoming a principal in the next. Promiscuity is the central theme and although the actual consummation of the amorous adventure is in no instance presented on the screen, the conclusion is inescapable. Prostitution and sex indulgence is the end result. In our opinion, the presentation of such a film in motion pic-

ture theatres in this State is 'immoral' and 'would tend to corrupt morals' within the meaning of section 122 of the Education Law.

"The appeal is dismissed" (R 32).

Appellant then commenced a proceeding in the Supreme Court of the State of New York, Albany County, pursuant to Article 78 of the New York Civil Practice Act, seeking a review and annulment of the determination of the Board of Regents and a direction for the issuance of a license. The proceedings were transferred by consent to the Appellate Division of the Supreme Court, Third Judicial Department, and that court on June 27, 1952, by a three-to-two decision, confirmed the determination of the Board of Regents (R 48).

Appellant thereafter appealed to the Court of Appeals of the State of New York, which on May 28, 1953 affirmed the order of the Appellate Division by a four-to-two decision (R 56).

A summary description of the film is to be found in one of the reviews included in the record, *i. e.*, the review of the Daily News, Los Angeles, Sept. 21, 1951 (R 10A):

"It is a French film about Vienna at the turn of the century, the Vienna of candlelight and carriages, of wine, women and waltzes. And 'La Ronde' is a waltz, about love, the round of love.

"It is told in a series of intertwined episodes in which a street girl . . . loves a soldier . . . and the soldier in turn loves a lush little servant girl . . ., who loves her master's son . . ., who loves a married woman . . . whose rather stolid husband loves a naive model . . ., while the model loves a poet . . ., who loves a worldly actress . . ., who loves a count . . ., who, in turn, loves the street girl with whom this ring-around-the-romance began.

"All this is told with a combination of irony, candor and gentleness that makes of the whole a total gem of a motion picture. The film is based on Arthur

Schnitzler's play 'Reigen,' as adapted to the screen by Max Opbuls and Jacques Natanson, and it has been directed with exquisite taste by Ophuls, who in the '30s directed a very fine film, 'Liegelei,' from another Schnitzler work.

"The distinguished cast is flawless . . . Gracefully holding together this episodic chain of events is Anton Walbrook as the sophisticated narrator . . . Oscar Strauss' haunting waltz, 'La Ronde de L'Amour,' is the recurring musical motif of the movie.

"This is a picture about illicit love, but it is told without prudishness and with a deftness, discretion and understanding that make it more moral than most censor-shackled pictures on the subject.

"'La Ronde' has wit. It also has melancholy. And above all it has honesty and artistry. . . ."

In the United States the film has had long successful runs in the following cities, among others:

Alabama:	Montgomery
Arizona:	Tucson Phoenix
California:	Los Angeles San Francisco Palm Springs Monterey Sacramento Burbank Hollywood Berkeley
Colorado:	Denver
Connecticut:	Old Saybrook Bridgeport Westport
Delaware:	Wilmington

District of Columbia:	Washington
Florida:	Miami
	Palm Beach
	West Palm Beach
Kentucky:	Louisville
Louisiana:	New Orleans
Maine:	Lewiston
Massachusetts:	Pittsfield
Michigan:	Detroit
	East Lansing
	Marlette
	Flint
	Ann Arbor
	St. Joseph
Missouri:	St. Louis
Montana:	Missoula
Nebraska:	Omaha
New Jersey:	Asbury Park
	Atlantic City
North Carolina:	Charlotte
	Greensboro
	Durham
Oklahoma:	Tulsa
Oregon:	Portland
Texas:	Houston
	Austin
	San Antonio
	Fort Worth
Utah:	Salt Lake City
Washington:	Lake City
Hawaii:	Honolulu

"La Ronde" has been shown in many of the world capitals, among them London, Berlin, Vienna, Paris, Brussels, Amsterdam, Stockholm, Oslo, Copenhagen, Geneva, Buenos Aires, Rio De Janeiro, Mexico City, Sydney, Tokyo, Madrid, Lisbon, Beirut, Athens, Montevideo and Lima.

In London, "La Ronde" played 18 months in the Curzon Theatre, in Paris over two years (R 35). It has won prizes as the best film of 1951 in London, Cuba and Montevideo (R 42, 43). It has received the highest awards at International Film Festivals in Venice, Cannes and Brussels (R 38). It was an Academy Award nominee in Hollywood in the spring of 1952 for story and art direction (R 45, 46).

The motion picture was imported into the United States after inspection by Customs without adverse comment. The record shows that the film has been well received throughout its wide run, and has received the acclaim of outstanding dramatic critics (R 8b, 11, 12, 22, 36, 37, 38, 42, 43, 44).

The Statutes Involved

New York Education Law, Secs. 101 and 120-132, inclusive, are set forth in full in Appendix A to this brief, as are certain rules and regulations for review and licensing of motion pictures, issued by the Board of Regents of the University of the State of New York. At this point, the most pertinent provisions of the New York Education Law are set forth.

Section 122 of the New York Education Law provides:

> "The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and

unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected *in toto*."

Section 129 of the Education Law provides:

"It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe."

Section 131 of the New York Education Law provides:

"A violation of any provision of part two of this article shall be a misdemeanor."

Specification of Errors.

The errors upon which appellant relies to reverse the Court of Appeals of the State of New York are set forth in the Assignment of Errors (R 90), which assert that the Court erred in the following respects:

1. In holding that motion pictures are not protected by the free speech guarantees of the First and Fourteenth Amendments of the Constitution of the United States.

2. In holding that censorship, as to the exhibition of motion pictures, does not violate the First and Fourteenth Amendments to the Constitution of the United States,

3. In holding that the denial of the right publicly to exhibit appellant's motion picture film "La Ronde" because the film was found by appellees to be "immoral" and such as "would tend to corrupt morals," was not an abridgement of freedom of speech or of the press in contravention of the First and Fourteenth Amendments to the Constitution of the United States.

4. In holding that Sections 120, 122, 124, 129 and 131 of the New York Education Law, which prohibit the exhibition of a motion picture film until a license therefor has been granted by administrative officers designated therein, and which provide for the denial of a license to any film which such administrative officers find to be "immoral" or such as "would tend to corrupt morals," do not abridge freedom of speech or of the press, in contravention of the First and Fourteenth Amendments to the Constitution of the United States.

5. In holding that Section 122 of the New York Education Law, providing for the denial of a license publicly to exhibit any motion picture film if found to be "immoral" or such as "would tend to corrupt morals," is not so vague and indefinite that its enforcement violates the "due process" clause of the Fourteenth Amendment to the Constitution of the United States as well as the free speech guarantee of the First Amendment to the Constitution of the United States.

6. In holding that the denial of a license to exhibit the film "La Ronde" on the ground that it is "immoral" and "would tend to corrupt morals" did not deprive appellant of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

7. In holding that Section 122 of the New York Education Law was properly applied by the appellees, and that the motion picture "La Ronde" is "immoral" or "would tend to corrupt morals," and that said motion picture is of such a character that the First Amendment to the Constitution of the United States permits a State to exclude from public view.

8. In holding that appellees were not delinquent in failing to adopt definite and objective rules and regulations for the guidance of the Motion Picture Division of the New York State Department of Education in the exercise of the censorship powers conferred by Section 122 of the New York Education Law.

Summary of Argument

I.

1. This Court has ruled that expression by means of motion pictures is included within the free speech and free press guarantees of the Constitution. The New York system of censorship controls the expression of ideas by motion pictures. It establishes a system of inspection and licensing which requires approval of the content of a film by the censor in advance of exhibition to the public. This system on its face contravenes the First and Fourteenth Amendments of the United States Constitution and is void.

2. This Court has invalidated the instant statute in so far as it permitted censorship of motion pictures alleged to be sacrilegious. But whether censorship of motion pictures *per se* is permissible was not decided. Our form of government encourages the expression of thought; one who abuses this right is subsequently liable for a transgression, either by criminal or civil

process. Censorship historically has been and today is a particularly restrictive form of previous restraint, since it requires inspection of and permits control over thought.

3. The body of law protecting other means of expression of ideas should apply to motion pictures. The protections of the First and Fourteenth Amendments have never permitted prior examination of content of speeches, publications, radio or television programs. Where the State's police power to license has been upheld, the power to license did not empower the licensing authority to judge the expressions or words themselves, and, by the same reasoning, content control of films should be invalid. Motion pictures are not more "difficult" to control than the press, radio, comics, or television, and their effectiveness should be no reason to exclude them from the protection. Convenience is not the criteria for invasion of a constitutional right.

II.

The New York statute authorizes denial of a license if the censors find the motion picture "immoral" or would "tend to corrupt morals". Even if censorship *per se* is not invalid, the instant statute must fall because the terms "immoral" or "tend to corrupt morals" are indefinite and vague.

By the division in the court below, "immoral" has not gained a definite, authoritative construction, although two Judges in the Court of Appeals sought to confine the terms to sexual immorality. The Regents have not given precision to the terms by adequate rules or regulation, nor have they gained definiteness from judicial construction. What is "immoral" in the realm of science, history,

government, art, the market place, has the widest variety of meanings. The point at which the censorship will be imposed is nowhere marked out and it is this very indefiniteness that spells the invalidity of the statute both as a serious threat to freedom of expression and as a denial of due process.

III.

Assuming that censorship were permissible and that the terms at issue are not indefinite, the application of this statute to "La Ronde" was improper and served to deprive appellant of its right to free speech and of its property without due process. The opinions of qualified critics have been universally laudatory. "La Ronde" has won prizes as the "best film" in several international film festivals. It has not been characterized as "obscene" by the Regents. Whether it would corrupt morals is at least debatable. "La Ronde" is no more immoral than other films which have been granted licenses by the Regents, where the same theme was involved. To permit the State to ban the showing of "La Ronde" would sanction the repression in advance of any film dealing with a controversial theme, and would encroach on freedom of expression.

ARGUMENT

POINT I

The system of censorship of the New York Education Law violates the First and Fourteenth Amendments of the United States Constitution.

A. This Court Has Repudiated Restriction on Expression of Ideas in All of Its Forms When Restrictions Either in Express Terms or in Effect Constitute Censorship.

Section 122 of the New York Education Law controls the expression of ideas by means of motion pictures, and establishes a system of inspection and licensing for all films other than newsreels and certain scientific and educational films exempted under Section 123. Distribution of motion pictures without a license is a penal offense (Education Law, Secs. 129 and 131).

In *Burstyn* v. *Wilson*, 343 U. S. 495, where this very system was under review, the Supreme Court overruled *Mutual Film Corp.* v. *Ohio*, 236 U. S. 230, to the extent that *Mutual* had excluded motion pictures from the protection accorded other media of communication and held that (p. 502):

> ". . . expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."

This protection accorded to other media of expression has invariably been construed by this Court to protect those media from inspection and licensing of the content of the matter sought to be communicated, and accordingly

the body of law protecting speech and press from any system of inspection and licensing should invalidate New York's motion picture censorship statute.

Although the Supreme Court said in the *Burstyn* case that "New York cannot vest such unlimited restraining control over motion pictures in a censor," it had before it the term "sacrilegious" as the only standard there under attack. The Court did not find it necessary to decide whether a state may censor motion pictures under a clearly-drawn statute designed and applied to prevent the showing of obscene films. This Court was undoubtedly unwilling to speculate on methods of control of a motion picture which is obscene. But the instant case will not help determine the issue of permissible control over obscene films for the reason that "La Ronde" is not obscene, and although that category is in the New York statute, the film was rejected on other grounds. If, as we contend in this point, any system of inspection and licensing is condemned, that is not to say that exhibition or distribution of obscene films is to be condoned or permitted; however, the arm of the constitutional protection of freedom of speech embraces even objectionable films.

Despite the absorptive power of the Fourteenth Amendment, which makes the prohibition of the First Amendment applicable to the states (*Gitlow* v. *New York*, 268 U. S. 652), various states and municipalities, in purported exercise of the amorphous police power over health, morals and welfare, have attempted to regulate speech and press. This Court has invalidated such invasions of freedom of speech and of the press in each case where the effect of the statute was to impose censorship. Even prior to *Burstyn* v. *Wilson*, *supra*, and *Gelling* v. *Texas*, 343 U. S. 960, this Court indicated a two-fold distinction in cases affecting free speech and free press: (1) subsequent punishment as distinguished from

previous restraint[1]; and (2) previous restraint as distinguished from censorship[2].

Subsequent Punishment as Distinguished from Previous Restraint

Chief Justice Hughes succinctly stated the dichotomy of subsequent punishment and previous restraint in *Near* v. *Minnesota*, 283 U. S. 697, when he said (p. 720):

"The fact that the liberty of the press may be abused

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[1] *Feiner* v. *New York*, 340 U. S. 315. Street speech inciting to riot in contravention of state penal law could be punished.
Terminiello v. *Chicago*, 337 U. S. 1. Public hall incitive address disturbed peace in violation of Chicago penal ordinance which was held invalid.
Kovacs v. *Cooper*, 336 U. S. 77. Penal ordinance prohibiting sound trucks emitting loud and raucous noises held valid.
Winters v. *New York*, 333 U. S. 507. Penal statute prohibiting "crime" magazines held vague.
Craig v. *Harney*, 331 U. S. 367. Newspaper publishing unflattering comments about judge's handling of case may not be held in contempt.
Pennekamp v. *Florida*, 328 U. S. 331. Newspaper published unflattering document about judge held in contempt.

[2] *Niemotko* v. *Maryland*, 340 U. S. 268. Practice of local community requiring permit to speak in public park held invalid as an indefinite standard.
Kunz v. *New York*, 340 U. S. 290. Local ordinance requiring licenses to speak in public streets held invalid on ground of indefiniteness of standard.
Saia v. *New York*, 334 U. S. 558. Local ordinance requiring permit for sound trucks held invalid—because of indefiniteness of standards.
Hannegan v. *Esquire*, 327 U. S. 146. Postmaster's denial of second class mailing privileges held invalid because based on a construction of a federal statute tantamount to censorship.
Lovell v. *Griffin*, 303 U. S. 444. Ordinance providing for a permit for distribution of "literature" held invalid for indefiniteness. *Cf. Murdock* v. *Pennsylvania*, 319 U. S. 105; *Jones* v. *Opelika*, 316 U. S. 587, 319 U. S. 103.
Cantwell v. *Connecticut*, 310 U. S. 296. Municipal ordinance empowering city official to grant license for religious purpose, held void.
Near v. *Minnesota*, 283 U. S. 697. Statute prohibiting publication in newspaper of obscene or defamatory matter (unless defamatory matter justified), held void.

> . . . does not make any the less necessary the immunity of the press from previous restraint . . .. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

This Court there implied a distinction between previous restraint and the "calculated risk" which all publishers and distributors take when what they may publish or distribute will offend laws purporting to regulate conventions and morals of the community. Penal prosecution may be the consequence of publication and distribution; but at least in publishing and distributing a distributor may choose to risk punishment in order to create an atmosphere favorable to the motion picture or other media. Those protections with which Anglo-American law traditionally cloaks a defendant in a criminal prosecution do not obtain in the New York censorship system, which is a proceeding without hearing or opportunity to present evidence. Judge Dye, dissenting in the Court of Appeals, said below (R 80):

> "Resort to the criminal statutes dealing with obscenity and the cases construing such statutes are of little help in solving our present problem for here we deal with a licensing statute authorizing restraint in advance. In the one we deal with evidentiary requirements sufficient to support the conviction beyond 'reasonable doubt', while in the other when the issue is debatable 'some' evidence is sufficient. In the one the proof must meet the standards of the hearsay rule to assure competency, relevance and materiality while in the other formal rules of evidence may be dispensed with entirely."

Censorship as Distinguished from Previous Restraint

Since the question as to whether motion picture censorship *per se* is invalid was not decided in the *Burstyn* case,

it is appropriate to inquire into the distinction between censorship and previous restraint.

Censorship denotes a system requiring a state or local official to inspect and license all films prior to distribution and exhibition. In *Burstyn* this Court described the New York statute as a censorship system requiring that "permission be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated".

Historically, the term "previous restraint" has been descriptive of statutes imposing a system of inspection and licensing, *i. e.*, censorship. The term, insofar as research has revealed, originated with Blackstone whose first edition of "Commentaries on the Law" was published shortly before the American Revolution. To Blackstone, previous restraint was a system of inspection and licensing, the system involved in the instant case. Freedom from such previous restraint was absolute to Blackstone:

> "The liberty of the press is essential to the nature of a free state; but this consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public. To forbid this is is to destroy the freedom of the press . . . To subject the press to the restrictive power of a licenser as was formerly done, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrator and infallible judge of all controverted points in learning, religion and government." Blackstone's Commentaries on the Law, p. 814 (Gavit, Ed., 1941).

Thus, previous restraint and censorship were equated, and no exception to absolute immunity was intimated until the *Near* case.[3]

Prior to *Near* v. *Minnesota, supra*, it is clear that the line of cases dealing with freedom of expression made no exception to absolute immunity from previous restraint. In *Near*, there is the dictum that previous restraint is not absolutely without limit (pp. 715-16). In that case, the statute did not impose a system of inspection and licensing. The statute permitted injunctive measures involving temporary or permanent suppression of newspapers or other publications which were (a) obscene or (b) defamatory.[4] Since the clause dealing with (b), defamatory publications, was the sole issue in *Near*, it was not there necessary to consider whether obscene publications could be constitutionally suppressed temporarily or permanently by injunction as to future publica-

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[3] In 2 Kent's Commentaries, pp. 17-18 (13th Ed. 1884), 2 Story's Commentaries, Secs. 1884-1892 (5th Ed. 1891), and 2 Cooley's Constitutional Limitations, pp. 876-886 (8th Ed. 1927), there is adherence to the views of Blackstone, and each author, in turn, embraces the term "previous restraint" as descriptive of and synonymous with the institution of censorship which, they all agree, is absolutley prohibited by the First Amendment.

The term "previous restraint" was employed in the earliest State (*Commonwealth* v. *Blanding*, 3 Pick. 304, 313-314) and Federal cases (*Respublica* v. *Oswald*, 1 Dallas 319, 325). Eventually, the statement from *Commonwealth* v. *Blanding* that the First Amendment was "intended to prevent all such previous restraints upon publications as had been practiced by other governments, and in early times here" was cited with approval in *Patterson* v. *Colorado*, 205 U. S. 454, 462, where immunity from previous restraint was characterized as the "main purpose" of the First Amendment.

[4] The statute provided that: "Any person . . . who shall be engaged in the business of regularly or customarily producing . . . (a) an obscene . . . or (b) a . . . defamatory . . . periodical, is guilty of a nuisance and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

"In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and justifiable ends . . ."

tions. Nonetheless, Chief Justice Hughes, in the paragraph in which he stated that immunity from previous restraint is not unlimited, stated by way of dictum that "the primary requirements of decency may be enforced against obscene publications." This dictum was confined to the statute there involved, one permitting injunctive relief, not a statute, like the New York Education Law, imposing a system of inspection and licensing.[5] When the *Near* dictum was removed from its context and transplanted to the soil of the New York censorship statute, as it was in the *Burstyn* case, where this Court failed to distinguish between the nature of the restraint imposed by the Minnesota statute and that imposed by the New York statute, this Court ignored the issue which split the Court in the *Near* case and resulted in a 5 to 4 decision.[6] Mr. Justice Butler, in dissent, emphasized that if the *Near* statute had imposed a system of inspection and licensing, *i. e.*, censorship the minority would have unhesitatingly invalidated it.

The distinction between the concept of censorship and previous restraint, implied in the *Near* case, is found in more recent cases. For instance, in *Niemotko* v. *Maryland*, 340 U. S. 268 and *Kunz* v. *New York*, 340 U. S. 290, this Court implied a distinction between prior restraint and censorship of speech. In each case it was indicated that it was constitutionally permissible for a

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[5] It should be remembered also that Chief Justice Hughes in the *Near* dictum relied upon Chafee, "Freedom of Speech" (1920), p. 10, which in turn, relied upon *Mutual Film Corporation* v. *Ohio*, 236 U. S. 230. Chafee erred in citing the *Mutual* case for the proposition that censorship could be imposed under a free speech clause. This Court in *Mutual* said "Freedom of opinion and expression are too certain to need discussion" (p. 243).

[6] Chief Justice Hughes regarded the system under the *Near* statute as previous restraint and thus extended the constitutional protection to that system because the statute provided for judicial examination as to the good motives and justifiable ends of the publication.

municipality to require a permit or license as a condition precedent to the delivery of speech in a public park or other public place. Prior restraint might be valid, the Court said, if there were "narrowly drawn reasonable and definite standards for the officials to follow" (*Niemotko* v. *Maryland, supra,* at p. 271). In short, without precise and definite standard, statutes permitting prior restraint on speech impose an indirect censorship. Even the threat of the possibility of censorship is sufficient to invalidate a statute imposing restraint on freedom of expression.[7]

The *Near* dictum referred to above may have been relied on by this Court in the *Burstyn* case because in *Near,* as in *Burstyn,* the Supreme Court was unwilling to voice approval of obscenity in advance. And this Court may well say that there should be some means of controlling obscene films,—just as in *Near* Chief Justice Hughes indicated there might be some limits on obscene newspapers. However, censorship is not a permissible method of control; it was not implicitly or explicitly indicated as a permissible method of control of obscene newsprint in *Near,* and we have no warrant whatsoever, nor is it possible, to make an exception to the over-riding principles of freedom of expression in the case of motion pictures.[8]

Censorship, which allows control over content, is the most restrictive and most pernicious form of previous restraint and it is especially to be condemned. A censorship statute is not a permissible method of control, whether narrowly drawn or not, whether containing definite standards or not.

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[7] *Cf. Thornhill* v. *Alabama, infra,* p. 21.

[8] A possible means of control is suggested by the type of injunctive statute involved in the *Near* case.

B. Motion Pictures Are Entitled to All the Protections Which Apply to a Free Press or Other Media of Communication.

Although the *Burstyn* case held that motion pictures were organs of public opinion, it did not decide that all the rights which this Court has applied to press and speech extend to motion pictures.

The body of law on Federal constitutional guarantees, including immunity from censorship, indicates they are not to be limited to forms of publication and media for dissemination of information available at the time the Constitution of the United States was adopted. In a case involving distribution of pamphlets, an ancient communication device comprehended within the terms of the First Amendment, Chief Justice Hughes stated:

> ". . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion . . ." (*Lovell* v. *Griffin*, 303 U. S. 444, 452).

Congress, in dealing with radio, a medium of communication which discharges functions similar to other forms of the press, has recognized that there is an absolute protection against a system of inspection and licensing of content, *i. e.*, censorship, which historically has accompanied membership in the "press".[9] Radio, as this Court has observed, in upholding a regulation of

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[9] Section 326 of the Federal Communications Act of 1934 (47 U. S. C. 326) provides as follows:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Thus Congress has recognized a distinction between censorship and licensing for the operation of radio stations.

the Federal Communications Commission, is protected from censorship. *National Broadcasting Co.* v. *Federal Communications Commission*, 319 U. S. 190, 226.

A penal statute containing indefinite criteria constituted, according to *Thornhill* v. *Alabama*, 310 U. S. 88, a threat to freedom of expression which did not differ materially from the threat posed by a statute imposing a censorship. In the *Thornhill* case, this Court did not hesitate to declare such a statute invalid, even though it was applied to picketing, a medium of communication not originally anticipated by the framers of the Constitution.[10]

Amplification of natural speech by means of sound-trucks and other devices, even though hardly within the contemplation of the Framers, has received constitutional protection (*Saia* v. *New York*, 334 U. S. 558), when the restraint threatened to impose a censorship. See *Kovacs* v. *Cooper*, 336 U. S. 77, 82.

Motion pictures on television are free from censorship. A State which sought to extend its law of censorship of motion pictures in theatres to this new medium was prevented from so doing in *Dumont* v. *Carroll*, 184 F. (2d) 153 (C. A. 3rd 1950), *cert. den.* 340 U. S. 929. The Court of Appeals rejected the efforts of the Pennsylvania State Board of Censors to extend its jurisdiction by introducing a system of inspection and licensing into the field of television which, after all, represents a combination of the techniques of radio and motion pictures. The Court held that the national government, by the enactment of the Federal Communications Act of 1934, had so occupied the field of television communication that

[10] Although the *Thornhill* doctrine has been limited by this Court, no case has rejected the basic concept that picketing is protected by the First Amendment, or its assumption that picketeers are immune from censorship. See *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *Emanuel Gordon, Giboney v. Empire Storage & Ice Co.: A Footnote to Free Speech*, 36 Va. Law Review. 25 (1950).

states were precluded from exercising control over that medium by "antique methods of censorship."

The First and Fourteenth Amendments have prevented prior examination of the content of speeches, publications, radio or television programs. Where the State's police power to license has been upheld, the licensing authority has not been permitted to judge expressions or words themselves. By the same reasoning, control over the content of motion pictures should be invalid.

It may be true that motion pictures present their own peculiar problems, just as do sound-amplifying devices, radio and television and other media of expression not yet known to man. But in the application of our principles of law, in our concepts of freedom and the dignity and worth of human expressions immunity from censorship is an absolute which is not to be abandoned because the new means are more effective or more adapted to modern social conditions. The Constitution is a living, growing organ, whose meaning and vitality cannot be contained within the petticoats of yesterday. Its principles must be applied to meet ever-changing modern conditions.

C. The Opinions Below for the Denial of the License Frustrate the Constitutional Mandates of Freedom of the Press and of Speech.

This case evoked a variety and contrariety of views in the Court of Appeals,[11] as well as in the Appellate Division of the Supreme Court of New York.

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[11] In the Court of Appeals the opinion of Froessel, *J.*, in which Lewis, *J.*, concurred and in which Conway, *J.*, in a Memorandum, concurred with reservations (to be considered under Point II), has *not* been designated as the opinion of the Court. Desmond, *J.*, affirmed in a separate opinion, in which Conway, *J.*, concurred, with reservations (to be considered under Point II). Dye, *J.*, dissented in an opinion in which Fuld, *J.*, wrote a separate dissent.

A composite of the views expressed in the majority opinions of Judges Froessel and Desmond on the question of validity of censorship, *per se*, may be summarized as follows: (1) Unlicensed motion pictures "may" present a clear and present danger of evil to the community, and it is, therefore, necessary to submit all films to censorship in order to avoid the danger that a particular film may create; and (2) no method of control, other than censorship, is effective to prevent the exhibition of immoral films.

(1) Clear and Present Danger Doctrine Does Not Apply to Censorship.

The Froessel opinion holds that the system of inspection and licensing contained in Section 122 of the Education Law of the State of New York is a constitutional exercise of the power of the State to control the morals, health and welfare of its people; that motion pictures "*may* present a 'clear and present danger' of a substantive evil to the community . . ." which demands "special measures of control" embracing "some form of censorship" (R 58).

The cases under which the "clear and present danger" doctrine has been applied by this Court do not involve censorship and, in the main, are criminal prosecutions.[12] There was no occasion, therefore, for the New York Court to apply that doctrine for it is not applicable to the question of whether or not the State has the *power* to impose censorship. The mere fact that a particular motion picture "may," if exhibited, constitute a "clear and present danger" to the morals of the State does not warrant inspection of all motion pictures to determine whether each one measures up to the censors' concept of what is moral.

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[12] *Dennis* v. *U. S.*, 341 U. S. 494, 504, and cases cited therein.

The cases cited by Judge Froessel do not involve censorship.[13]

The doctrine of clear and present danger was originated to mitigate the harsh effects of criminal prosecutions under the Espionage Acts of the First World War. It would be ironical were the doctrine to be applied to restrict the full scope of immunity from censorship which historically constitutes the "main purpose" of the First Amendment.

Moreover, there is no need, to quote the Froessel opinion, "to find a proper balance" between the claim of motion pictures to be immune from censorship and the obligation of the State to protect the morals of its people. To be sure, this Court has indicated that the rights of freedom of speech and of the press exercised in parks and other public places are to be accommodated to the exigencies of the entire community in the use of public

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[13] *Poulos* v. *New Hampshire*, 345 U. S. 395, involves an appeal from a conviction for an exercise of speech without a permit in an area and under circumstances where, in similar cases (*Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290, this Court had indicated that a permit may be required by a municipality in order to accommodate divers interests of the community. The precise question in *Poulos* was whether a state's prescription for review of a refusal to grant a permit must be followed, or whether the constitutional question of the validity of the refusal could be raised as a defense to a criminal prosecution for the delivery of the speech without a permit. This Court held that the procedure prescribed by the State of New Hampshire, in that particular instance, did not violate the First and Fourteenth Amendments.

Beauharnais v. *Illinois*, 343 U. S. 250; *Dennis* v. *United States*, 341 U. S. 494; *Kovacs* v. *Cooper*, 336 U. S. 77; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Schenck* v. *United States*, 249 U. S. 47; *Fox* v. *Washington*, 236 U. S. 273, are all appeals from convictions for the exercise of speech or press. In *Dennis* v. *United States*, *supra*, at p. 507, this Court said: ". . . in *American Communications Assn.* v. *Douds* . . . we therefore held that any indirect sanction on speech which might arise from the oath requirement did not present a proper case for the 'clear and present danger' test", thus removing support from Judge Froessel's reliance on the *American Communications* case (339 U. S. 382).

property. *Niemotko* v. *Maryland, supra,* and *Kunz* v. *New York, supra.* But there is no intimation in these cases that the concept of balancing interests should be extended to a censorship situation. It is constitutionally permissible for the State to balance the advantage derived from licensing speakers for park and street addresses against the value of freedom of expression so long as that system does not threaten a censorship. The threat of censorship occurs when the licensing standards are indefinite. If the mere threat is sufficient to invalidate a statute, *a fortiori,* a statute which specifically imposes a censorship is void.

The place "to find the proper balance," therefore, in the case of censorship as here, is in the prohibitions of the First Amendment. There the weights against censorship meet no counterweights in its favor. Nothing, with the possible exception of war or recourse to amendment,[14] can upset that balance.

(2) Censorship Is Not Essential for Control of "Immoral" Films or Other Expressions.

The opinions of the Court of Appeals sustaining the Regents indicate that there is no effective way to suppress "damaging" films except by a system of censorship. Are films so different from other media of communication in their form, distribution or effect that inspection of their content is necessary prior to exhibition? Motion pictures are a combination of sound and pictorial techniques. Their control is not less "feasible" or difficult than that of the press, radio, comics, stage or television.

Recent developments have tended to obliterate distinctions between communication media, and it is in that context that one should consider the Froessel conclusion

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[14] See *Rostow, The Democratic Character of Judicial Review,* 66 Harvard Law Review, 193, 197.

that censorship and "no other method will afford reasonably adequate protection" from the publication and distribution of immoral materials.[15] If the opinion below is correct, not only the medium of motion pictures should be subjected to censorship but also other members of the press may be exposed to this "antique method of censorship."[16]

Conceding a disposition to control the press, the material gathered for release on the major news services could be inspected and censored in advance of publication at least as feasibly or conveniently as motion pictures, even though more censors might be required. In Russia today "the press, as a whole, including its radio and telegraphic agencies, is a government monopoly. It is regulated by a licensing and censoring bureau . . . ."[17] If we say, as did Judge Desmond below, that there is no effective way to suppress damaging films except by a system of censorship, we may as well say there is no effective way to suppress any "harmful" medium of communication.

What is the evil that would flow from the exhibition of an unlicensed film? If it be disorder in the theatre, the remedy is to arrest those committing the disorderly conduct;[18] if it be that the young are easily influenced,

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[15] See, *e. g.*, Vitray, *Pictorial Journalism* (1939), pp. ix-xi, 3-8; Note, *Motion Pictures and the First Amendment*, 60 Yale Law Journal, 696 (1951). Indeed, the reference to the development of third dimensional techniques in motion pictures (R 60; Froessel Opinion, R 60; *Commercial Pictures* v. *Regents*, 305 N. Y. 336, p. 342) assumes special significance in view of the development in comics and cartoons of techniques which represent patent efforts to trade upon the publicity attendant upon the development of third dimensional techniques in the field of motion pictures.

[16] But *cf. Dumont* v. *Carroll*, 184 F. 2d 153 (3d Cir., 1950), cert. den. 340 U. S. 929.

[17] Hocking, W. E., *Freedom of the Press*, Univ. of Chicago Press (1947), p. 26.

[18] *Cf. Terminiello* v. *Chicago*, 337 U. S. 1.

the remedy is to keep the young out of the theatre. In fact, in New York it is a misdemeanor for a child under 16 to be permitted to enter a public motion picture theatre unless accompanied by its parent or guardian (Penal Law, Sec. 484, subd. 1). If the evil to be expected is an improper influence on children, then special laws may be enacted for protecting the morals of children, but statutes restricting expression must not be more restrictive than necessary to meet the danger.

The public is subjected to the impact of profusely illustrated newspapers, comics and television programs appearing simultaneously in large areas and viewable by a greater audience of a wider age range than available for the medium of motion pictures. Why should a film on television which may invade the home be acceptable, and the same film objectionable in the theatre? The cost of motion picture admissions and their restriction to those who pay to enter the theatre tend to limit the size of motion picture audiences. The effect of books or comic strips upon the reader cannot be said to be less than that of motion pictures. Both depend upon visual impact. A so-called objectionable scene in a motion picture is on and off the screen in a matter of seconds, whereas he who looks upon a still photograph of the same scene can glut himself at his leisure.

The members of this Court are familiar with runs and clearances employed in the distribution of motion pictures, and the statement in Judge Froessel's opinion that they "may be seen simultaneously throughout the State" (R 60) is not convincing. Certainly the simultaneity of distribution is less than that of the publications considered by this Court to be protected by the terms of the First and Fourteenth Amendments in *Winters* v. *New York*, 333 U. S. 507, 509. In that case, this Court held invalid a statute which prohibited the publication and distribution of books, pamphlets, newspapers or other printed papers

"devoted to the publication and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime," even though the New York Court of Appeals had limited the coverage of the statute to the massing of stories of criminal deeds to such a degree that the publications became indecent or obscene. This Court held that, even as so construed, the statute permitted within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech.

The argument that censorship is the only sufficiently speedy and effective method of coping with immoral films is not a warrant to abridge the freedom of motion pictures. As was stated in *Schneider* v. *Irvington*, 308 U. S. 147, 164:

> "If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

Thornhill v. *Alabama*, *supra*, nullifies the argument of the New York court that "experience has demonstrated over the years that * * * censorship has been and can be carried out without undue hardship or inconvenience" (R. 60) when it says (p. 97):

> "It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to free discussion."

The invalidation of censorship will not remove all control over the medium of motion pictures. In addition to the voluntary self-regulatory activities of the Motion Picture Association, the Federal laws against importation

and transportation of obscene films, New York, prior to the amendment of 1950 (L. 1950, ch. 624), provided in Section 1141 of the Penal Law for the prosecution and punishment of distributors and exhibitors of offensive films.

Judge Froessel conceded that the State could not "impose the moral code of saints" (R 59); nor, it is submitted, can the State impose that of the censors. For, if this were so, there would not be that "multitude of tongues" (Learned Hand, *J.*, *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (D. C. N. Y. 1943) or diversity of opinion which the First Amendment is designed to achieve.

> "To many this is, and always will be folly; but we have staked upon it our all." (L. Hand, *J.* in *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (D. C. N. Y. 1943)).

POINT II

Even were censorship permissible, the New York Education Law, Section 122, is on its face unconstitutional because it is so vague, indefinite and uncertain as to offend the First Amendment and the due process clause of the Fourteenth Amendment.

A. There Is No Authoritative Definition of the Terms "Immoral" and "Tend to Corrupt Morals" in the Court Below.

"La Ronde" was the first motion picture in which the refusal of a license solely upon the grounds that it was "immoral" and "tends to corrupt morals" reached the courts.[19] The terms, therefore, as used in Section 122

[19] So far as the Regents reports are available, only three other motion pictures have been rejected on the sole grounds of being "immoral" and as "tending to corrupt morals". See Appendix B.

of the Education Law were before the Court of Appeals for the first time in this case. And there, the Court did not render an authoritative construction of the terms.

In the Court of Appeals, four opinions and one memorandum opinion were issued. There is no "opinion of the Court." Four judges voted to affirm the Appellate Division decision, and two Judges dissented. However, there was no clear majority on the construction of the terms "immoral" and "tending to corrupt morals", as the Judges for affirmance differed, with two Judges (Froessel and Lewis) firmly holding that the terms meant "sexual immorality", one Judge (Desmond) interpreting the term to mean *"contra bonos mores"* and the fourth Judge holding inconsistently, that "immorality" meant "sexual immorality" and also *"contra bonos mores"*.[20] One dissenting Judge (Dye), in holding the term indefinite, noted that the term had not been connected with "obscene" and consequently "has a variety of meanings according to time, geography and, to some extent, subjective judgment" (R 80); the second dissenting Judge (Fuld) also said "immoral" did not set up a sufficiently definite guide for administrative action.

Thus, there is no binding definition of the term "immorality". It appears that at most three, and perhaps only two, of the Judges limited the term "immoral" to "sexual immorality". Article VI, Section 5 of the Constitution of the State of New York requires the concurrence of four Judges for a decision. Consequently, this Court is free to consider whether the terms "immoral" and "tend to corrupt morals" in the statute are indefinite without resorting to a gloss supplied by the Court of Appeals.

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[20] Judge Conway, who said: "I am in entire accord with the opinion of Judge Froessel but I believe that we may properly go further and therefore I fully agree also with the view stated by Judge Desmond in his concurring opinion" (R 72).

As Judge Fuld stated, the ephemeral and ambiguous character of the terms is highlighted by the variant views of the very Judges who wrote in the Court of Appeals to uphold the statute. Of the eleven Judges considering this case in the two courts below, only two or possibly three Judges limited the term "immoral" to "sexual immorality". The majority of the Judges recognized the fact that the term had been used in a variety of legal contexts and that the term, as a general proposition, cannot be said to have a set and fixed meaning in the law so as to meet the test of definiteness required by the due process clause of the Fourteenth Amendment.

Due process of law contemplates process under law, but where the law is uncertain there is no law. *Ubi jus incertum, ibi jus nullum.* The test "is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices" (*Jordan* v. *De George*, 341 U. S. 223, 231-232). When the words of the statute do not contain objective standards to indicate what is prohibited and what is permitted, "it offends Due Process in two ways: First, it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. Secondly, where licensing is vested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative." *Burstyn* v. *Wilson, supra,* at page 532; *cf. Gelling* v. *Texas, supra; Musser* v. *Utah,* 333 U. S. 95.

The rule of definiteness in a statute applies not only to criminal cases, but extends to statutes under which one may be deprived of financial gain. *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239. The indefiniteness of the standards of the New York law made it impossible for appellant to know in advance that "La Ronde" would be banned. By the denial of the li-

cense, appellant was deprived of a substantial property right, and even in the two years during which the film has been banned in New York, appellant's property has depreciated in market value.

B. Administrative Regulations or Rules of the Board of Regents Have Not Given Precision to the Terms "Immoral" or "Tends to Corrupt Morals."

There are no adequate rules or regulations of the Censors which may be applied as standards; the published decisions of the Regents or their predecessor body rarely set forth reasons to serve as a guide. The New York State Department reports, the only available source in New York State for ascertaining which motion pictures have been banned in New York by the Regents, generally contain no supporting statement of facts or reasons for their rulings. (See Appendix "B" attached to this brief, analyzing published decisions.) Thus, the administrative determinations do not mitigate the effect of the indefinite nature of the terms of the statute.

The failure to adopt standards was commented on by Judge Dye (R 78, 79):

> ". . . the board itself has been equally delinquent in failing to adopt rules and regulations for the guidance of its motion picture division in the exercise of censorship powers, but has left the generality of the statutory language to gain precision 'from sense and experience' (*Mutual Film* cases, *supra*), a method no longer approved (*Burstyn*), and is particularly objectionable here as it vests unlimited restraining control over motion pictures in a censor limited only by what an individual director of the motion picture division or, upon review, by what three members of the board itself happen to think about a particular picture at a given time (*cf. Winters* v. *New York*, *supra*; *Gelling* v. *Texas*, *supra*). Such lack, it goes

without saying, leaves an appellate court at a very great disadvantage. We do not know what standards guided the agency in making its determination. To supply such legislative omission by judicial fiat is not permissible under the division of governmental powers as fixed by the Constitution. . . ."

"La Ronde" was refused a license solely on the ground that it was "immoral" and "tended to corrupt morals" (R 7). In an effort to meet this objection, the film was edited and re-submitted but the reviewer adhered to his original determination. On appeal to the Regents, the Director of the Motion Picture Division in a verified answer stated in part: "The principal objection to the film in both its original and the revised versions is that it lucidly portrays moral standards which we deem contrary to the provisions of the laws of New York State and which we further deem would tend to corrupt morals within the meaning of the statute" (R 30-31).[21] This clearly indicates the subjective approach of the censor, necessitated by the want of administrative or statutory standards.[22]

The Board of Regents has never confined the term "immorality" to sexual immorality. This is pointed up by their ruling in *Broadway Angels* v. *Wilson*, recently

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[21] See Sections 122 and 124 of the Education Law.

[22] Justice Jackson, in the dissenting opinion in *Jordan* v. *De George*, 341 U. S. 223, 237-238, 239-240, expressed so well the injustice inherent in indefinite standards:

"Can we accept 'the moral standards that prevail in contemporary society' as a sufficiently definite standard for the purposes of the Act? This is a large country and acts that are regarded as criminal in some states are lawful in others. We suspect that moral standards which prevail as to possession or sale of liquor that has evaded tax may not be uniform in all parts of the country nor in all levels of 'contemporary society.' How should we ascertain the moral sentiments of masses of persons on any better basis than a guess? . . . Irrationality is inherent in the task of translating the religious and ethical conno-

reversed, —— App. Div. —— (Third Dept., November 18, 1953). Prior to the Court of Appeals' decision in the instant case, the Regents had denied a license to the film "Teen-Age Menace", which dealt with the use of narcotics by teen-agers, on the ground that the motion picture was immoral and tended to corrupt morals and to incite to crime. The intermediate court, the Appellate Division, annulled the determination of the Regents on the basis of Judge Froessel's definition of "immoral", and, for the first time in the history of motion picture censorship in New York, an independent examination of the findings of this administrative agency was made and the Appellate Division found affirmatively that there was not sufficient evidence to sustain the ruling of the Regents.

C. Judicial Construction of "Immoral" Has Not Narrowed or Limited the Term so as to Establish Standards to Guide Censors.

The term "immoral" is not a word of art in the law and has not acquired the precise meaning required by the Constitution when used in an attempt to infringe free speech by censorship.

(1) Interpretation of "Immoral" as Applied to Motion Pictures.

There have been but few litigated cases in New York concerning films claimed to be "immoral" or "tending to corrupt morals" to serve as a workable guide for the

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tations of the phrase into legal decisions. The lower court cases seem to rest, as we feel this Court's decision does, upon the moral reactions of particular judges to particular offenses. What is striking about the opinions in these 'moral turpitude' cases is the wearisome repetition of cliches attempting to define 'moral turpitude,' usually a quotation from Bouvier. . . . The chief impression from the cases is the caprice of the judgments. How many aliens have been deported who would not have been had some other judge heard their cases, and vice versa, we may only guess. That is not government by law."

censors. No case other than the instant one deals *solely* with rejection on the grounds of being "immoral" or as "tending to corrupt morals."

The only reported cases in New York involving censorship of motion pictures under Section 122 deal with:

Abortion. Held: "indecent," "immoral" and "would tend to corrupt morals and incite to crime" (*Matter of Distinguished Films, Inc.* v. *Stoddard*, 271 App. Div. 715, 68 N. Y. S. 2d 737 (3rd Dept. 1947), appeal denied, 272 App. Div. 842, 71 N. Y. S. 2d 728 (3rd Dept. 1947)).

Adultery. Held: "indecent," "immoral" and "would tend to corrupt morals" (*Matter of Mayer* v. *Byrne*, 256 App. Div. 431, 10 N. Y. S. 2d 794 (3rd Dept. 1939)).

The unduly-emphasized carnal side of sex. Held: "indecent" "immoral" and "will tend to corrupt morals" (*Matter of Eureka Productions, Inc.* v. *Byrne*, 252 App. Div. 355, 300 N. Y. S. 218 (3rd Dept. 1937)).

Sterilization. Held: "immoral" and "will tend to corrupt morals and incite to crime" (*Matter of Foy Productions, Ltd.* v. *Graves*, 253 App. Div. 475, 3 N. Y. S. 2d 573 (3rd Dept. 1938), aff'd 278 N. Y. 498 (1938)).

The birth of a baby. Held: "indecent", "immoral" and "would tend to corrupt morals" (*Matter of American Committee on Maternal Welfare, Inc.* v. *Mangan*, 257 App. Div. 570, 14 N. Y. S. 2d 39 (3rd Dept. 1939), aff'd 283 N. Y. 551 (1940)).

The term "immoral" has such a wide meaning that motion pictures dealing with the Russian Revolution or Soviet Russia (*Schuman* v. *Pickert*, 277 Mich. 225, 269 N. W. 152 (1936); *Thayer Amusement Co.* v. *Moulton*, 63 R. I. 182, 7 A. 2d 682 (1939)), or life in Poland (33 Ann. Rep. 2, 3 Md., 1948-49; *Time*, Oct. 31, 1949, p. 77, col. 2)

have been banned by censors outside of New York under the term "immoral".

(2) "Immorality" as Applied in Areas Other Than Motion Pictures.

"Immoral" has been used as a catch-all word to describe anything that offends. In this country conduct ranging from selling intoxicating beverages to buying political influence has been found immoral. At one time dancing was immoral, being a pauper was immoral, wearing of bathing attire which left shoulders bare was immoral. For example:

In *Jones* v. *Dannenberg Co.*, 112 Ga. 426, 37 S. E. 729 (1900), it was held to be both an illegal and immoral act to make an agreement for a consideration to suppress the prosecution of a criminal offense. In *Redd* v. *State*, 7 Ga. App. 575, 67 S. E. 709 (1910), a person was convicted of violating a statute against "open lewdness or any notorious act of public indecency, tending to debauch the morals" for putting a cow and bull together near a public highway in view of a woman and her children. In *Exchange National Bank of Fitzgerald* v. *Henderson*, 139 Ga. 260, 77 S. E. 36 (1913), the buying of political influence to secure the removal of a county site was held "immoral and illegal". In *Indiana Board of Pharmacy* v. *Haag*, 184 Ind. 333, 111 N. E. 178 (1916), a druggist's license was revoked for "gross immorality" because he sold intoxicating liquor contrary to law. In *Paust* v. *Georgeain*, 147 Minn. 149, 179 N. W. 735 (1920), a clause in a lease prohibiting "immoral practices" on the premises was held not to cover the sale of immoral books. In *Deadwyler* v. *Grand Lodge, Knights of Pythias*, 131 S. C. 335, 126 S. E. 437 (1924), the death of insured as a result of being shot in resisting search and arrest when under the influence of liquor was held not to be the result of intemperance or immoral conduct. In *Horosko* v. *School*

District of Mount Pleasant, 335 Pa. 369, 6 A. 2d 866 (1939), a school teacher who acted as a waitress in her husband's restaurant, served beer, took an occasional drink of beer, shook dice for drinks and showed customers how to play pin-ball machine, was dismissed as immoral. In *Jones* v. *Poole*, 62 Ga. App. 309, 8 S. E. 2d 532 (1940), a plaintiff in a slander action did not have to prove special damages but was entitled to general damages when defendant said plaintiff did not have a "morally clean house" because it would be understood as meaning a "lewd house". In *Appeal by Batrus*, 148 Pa. 587, 26 A. 2d 121 (1942), a teacher was dismissed on grounds of immorality because she obtained a distributor's liquor license in her own name for her father's use and submitted an affidavit that she was the sole person interested therein. In *Board of School Directors of School District of Borough of Wilmerding* v. *Gillies*, 343 Pa. 382, 23 A. 2d 447 (1942), the dismissal of a school teacher on grounds of immorality because he chose as his companions radicals and Communists and signed a nominating petition for candidate of the Communist Party, was reversed.

The absurd interpretations possible under so general a term is illustrated by *Edwards* v. *California*, 314 U. S. 160, where this Court disposed of the contention that the limitation upon state power is subject to an exception in the case of paupers who were "a moral pestilence".

> "But assuming that the term (pauper) is applicable to him and to persons similarly situated, we do not consider ourselves bound by the language referred to. *New York* v. *Miln* was decided in 1837. Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence'. Poverty and immorality are not synonymous." (*Edwards*, *supra*, at p. 177.)

Moreover, there is authority holding that a statute using the term "immoral" was defective because of indefiniteness. The Supreme Court of Louisiana has considered the constitutionality of two criminal provisions containing the term "immoral." In *State* v. *Truby*, 211 La. 178, 29 So. 2d 758 (1947), the defendants were convicted of "keeping a disorderly place." Under Article 104 of the Louisiana Criminal Code, "keeping a disorderly place is the intentional maintaining of a place to be used habitually for any illegal or immoral purpose." Defendants attacked the section on the ground that it was vague and indefinite and left to the court the determination of the definition of the crime. It was said to contravene in these respects the Constitution of Louisiana. The relevant provisions, however, embody the federal constitutional requirements of due process. The Court said (p. 185):

> "Defendants contend that the words 'illegal' and 'immoral' as used in the statute have no fixed and well-defined meanings, and that the article leaves it to the court to determine what is an illegal or an immoral purpose, or what illegal or immoral purposes the Legislature had in mind, and that the word 'immoral' might mean anything and might have different meanings in the minds of different people. They point out that an individual might be considered by some people to be immoral when he does not attend church regularly; when he does not contribute his share to charity; when he abuses his wife; when he is mean to his children; when he is wicked or vicious; when his principles are not so high as his neighbors."

The Court held the term "immoral" to be constitutionally invalid because it was vague, indefinite and uncertain

> ". . . because it fixes no immutable standard of guilt, but leaves such standards to the variant views

of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation. I think it is constitutionally invalid" (*State* v. *Truby*, *supra*, at p. 202).

Thereafter, an article, written by one of the drafters of the Louisiana Code, criticising the *Truby* decision, appeared.[22] Subsequently, another provision of the Criminal Code containing the term "immoral" was brought before the Court for construction in *State* v. *Vallery*, 212 La. 1095, 34 So. 2d 329 (1948). The provision there under review defined contributing to the delinquency of a juvenile as "the intentional enticing, aiding or permitting, by anyone over the age of seventeen, of any child under the age of seventeen to . . . . perform any immoral act". The Louisiana Court said (1099, 1100):

"For us to hold as suggested in the [Morrow] article

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[22] "'Immoral' obviously conveys some impression to the reader; it is in all dictionaries; it is in constant popular use; the average layman would have no difficulty in reciting innumerable things which were 'immoral' and in gaining common agreement of others there upon. When the court becomes concerned (as it clearly was in *State* v. *Truby*) that there is some area of meaning of 'immoral' about which everyone will not agree, then, as in the case of any other word, they have merely accomplished one of the steps in arriving at a 'genuine' interpretation. But where, specifically, lies the included area of meaning? It would be entirely reasonable in this instance to say that 'immoral' includes that which the great majority of members of the community would agree was 'immoral.' But when the area of only slight agreement was reached the court could well say that the conduct in question was not 'immoral'. In other words, in seeking a genuine interpretation of 'immoral' (and the obvious meaning of the legislature), the court would solve its problems very adequately by making 'immoral' identical with that which violated the well established and well accepted standards of the community. . . . it could exclude from the meaning of 'immoral' that which violated the standards of only a relatively small portion of the community." Morrow, Civilian Codification Under Judicial Review: The Generality of "Immorality" in Louisiana, 21 Tulane L. Rev. 545, 555-56 (1947).

would, in effect, be for us to clothe the several courts of this state with the power to not only decide what constitutes an immoral act within the concept of the community's accepted standard of 'immoral', but also to determine just what are the well established and well accepted standards of morality in the various communities of which these respective districts are composed, thus delegating to the judiciary a function that is exclusively within the province of the legislature, with the result that there would be no certain or understandable rule and no uniform standard of conduct to guide the individual in ascertaining what acts it is his duty to avoid, doing violence not only to the constitutional requirement that the ascertainable standards of guilt by which all citizens are to be guided be fixed by the legislative branch of the government but also to the equal protection and due process clauses safeguarding against discrimination.

"The drafters of the code could very easily have avoided the result reached in this case and the *Truby* case had they given the word 'immoral' a fixed and designated meaning as they did other words and terms used generally throughout the code in Article 2, or had they defined 'immoral act' and 'immoral purpose' as they did 'criminal intent' in Article 10 and 'criminal negligence' in Article 12."

Similar terms were presented to this Court in *Musser* v. *Utah*, 333 U. S. 95, where the Supreme Court considered whether a Utah statute which made it an offense to conspire "to commit acts injurious to the public morals" was valid. The information on which the defendants were convicted "specified acts which amount to conspiring to counsel, advise and practice polygamous or plural marriages". Although the case was remanded to the Utah

court to give it an opportunity to pass upon the question of indefiniteness which the Supreme Court *sua sponte* had raised, it said by way of dictum (pp. 96-97):

> "It is obvious that this is no narrowly drawn statute. We do not presume to give an interpretation as to what it may include. Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notion of what was good for health, morals, trade, commerce, justice or order. In some States the phrase 'injurious to public morals' would be likely to punish acts which it would not punish in others because of the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling. This led to the inquiry as to whether the statute attempts to cover so much that it effectively covers nothing. Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. . . . Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."

All the authorities, then, indicate the wide variety of meaning that judicial decisions have ascribed to the term "immoral" and kindred terms. When the term is not limited by the legislature or by judicial construction, the cases, particularly *Truby*, *Vallery* and *Musser* indicate that the term "immoral" falls because of indefiniteness.

D. The Judicial Construction Confining the Terms "Immoral" and "Tend to Corrupt Morals" to Sexual Immorality Is Not Warranted.

Both Judges Froessel and Desmond in separate opinions for affirmance read Section 122 of the Education Law *in pari materia* with sections of the Penal Law, the General Business Law and other sections of the Education Law.[24]

Common to both opinions is the citation of Sections 483, 485a, 486, 494, 1140a, 1141, 1141a and 1147 of the Penal Law, Sections 190 and 191 of the General Business Law, and Sections 2212, 3012, 3013, 3020 and 6804 of the Education Law. From these statutes, when read *in pari materia* with Section 122 of the Education Law, Judge Froessel drew the conclusion that the terms "immoral" and "tend to corrupt morals" should be confined to sexual immorality. Judge Desmond, on the other hand, drew the broader conclusion that the terms extended to the vaguer contours of the area embraced by the phrase *"contra bonos mores."*[25]

The terms "immoral" and "tend to corrupt morals" do not gain definiteness when considered in connection with the provisions of the statutes upon which Judge Froessel relied. Sections of the Penal Law of New York, although utilizing the terms "immoral" and "tend to corrupt morals" with other terms, never use them with the same terminology as Section 122 of the Education Law,

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[24] In addition, Judge Desmond relied on sections in the Social Welfare Law, Agriculture and Markets Law, the Village Law, and the Town Law.

[25] ". . . Sexual impurity is only one form of immorality (see *Swearingen* v. *United States*, 161 U. S. 446, 451. This picture 'La Ronde' could be classed as 'immoral' in the narrower sense, too, but the statutory meaning here is the usual or dictionary one (including the law dictionaries), and its reference is to the generally accepted civilized code of morals—its prohibition is of material *'contra bonos mores'* " (R 70).

and can therefore be distinguished from the section now under review, in this respect as well as others.

Because of the subject matter of some of these sections, the interpretation of immorality as sexual immorality may be proper, *e. g.*, carnal abuse of children, Penal Law, Sections 483 a and b; compulsory prostitution of women, Penal Law, Section 2460; sexual abuse while committing a felony, Penal Law, Section 1944a. Penal Law, Sections 1140a, 1141, 1145 and 1147, which also employ the term "immoral", appear under Article 106, which is entitled "Indecency". Here again the interpretation of "immoral" as sexually immoral is not strained. However, in Section 483, in which the term is used in a generic sense, permitting a child to use a slot machine was held to endanger his morals (*People* v. *Stein*, 146 N. Y. S. 852 (1913); *People* v. *Nahmias*, 146 N. Y. S. 856 (1913)). Wrongfully inviting a child to participate in a larceny was also interpreted as within the meaning of "to endanger the morals" of a child within Section 483, although the conviction was set aside on other grounds. *People* v. *Kramer*, 74 N. Y. S. 2d 715 (1947). *Cf. Kirkland* v. *Miles*, 66 N. Y. S. 2d 114 (1946).

Nor do other sections of the Education Law or the General Business Law tend to limit the meaning of "immoral" in the instant statute. There the terms are broadly used, of general and unlimited meaning; for example, the requirement, in the Education Law, that a person who desires a license to practice a profession must be of good moral character. Parenthetically, the constitutional principle does not there apply, since a profession is a privilege and no person has an absolute right to practice a profession involving health and welfare (*Matter of Marburg* v. *Cole*, 286 N. Y. 202, 206, 36 N. E. 2d 113 (1941)). *Cf. Schmidt* v. *United States*, 177 F. 2d 450, 451 (C. A. 2nd, 1949).

After citing the various sections of the Penal Law, Education Law and General Business Law, which we have just

treated, Judge Froessel noted, in interpreting the term "immoral" to mean "sexual immorality", that there was a "related usage—a gradation of language, proceeding from 'obscene' to 'indecent' to 'immoral'" (R 61). He specifically applied the rule of *ejusdem generis*, and also drew analogy with Section 1140-a of the Penal Law, which reads as follows:

> "Sec. 1140-a.
>
> "1. Any person who as owner, manager, producer, director, or agent or in any other capacity, prepares, advertises, gives, directs, presents or participates in, any obscene, indecent, immoral or impure drama, play, exhibition, show or entertainment, or any obscene, indecent, immoral, impure scene, tableau, incident, part or portion of any drama, play, exhibition, show or entertainment, which would tend to the corruption of the morals of youth or others; or who . . ."

"Inhuman," "sacrilegious" and "would tend to incite to crime" are not part of Section 1140-a of the Penal Law, and consequently the meaning of Section 122 of the Education Law cannot be limited by this analogy.

Even the terms "indecent" and "obscene" have not been confined to sexual impurity by the New York Court of Appeals. In *People* v. *Winters*, 294 N. Y. 545, 63 N. E. 2d 98 (1945) the Court of Appeals held Section 1141, subd. 2, of the Penal Law[28] was not to be given so limited an interpretation (p. 550):

> "To be sure, our statutes dealing with indecent or

[28] Subdivision 2 of Section 1141 then read as follows: "2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; or who . . ."

> obscene publications have generally been held to speak of that form of immorality which has relation to sexual impurity. . . . But to limit the above words of subdivision 2 of section 1141 to that restricted meaning would be to reduce that subdivision to an unnecessary partial reduplication of subdivision 1. Since our respect for the Legislature is enough to keep us away from that interpretation, we move along to the question of the validity of the broader scope of subdivision 2. . . . Collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, although not necessarily in the sense of being calculated or intended to excite sexual passion. This idea, as it seems to us, was the principal reason for the enactment of the statute."

This Court, in reviewing that decision, considered the section as construed by the Court of Appeals.

> "But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the statute to collections of stories 'so massed as to become vehicles for inciting violent and depraved crimes against the person . . . not necessarily . . . sexual passion,' we find the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner" (*Winters* v. *New York, supra*, 518, 519).

In *Winters*, the New York Court did not confine the term "obscene" to "sexual passion". Yet, in this case it relied upon the juxtaposition of "obscene" with "immoral" in Section 122 of the Education Law to confine the latter to sexual immorality. Neither the rule of *ejusdem generis* nor *noscitur a sociis* upon which Judge Froessel relied,

is applicable in construing the terms "immoral" and "would tend to corrupt morals" in Section 122 (See McK. Statutes, §239). In construing the Federal law (19 U. S. C. Sec. 1305(a)) prohibiting the importation of obscene or immoral books and pictures (in contradistinction to the Froessel construction), the Federal Courts have given each term its dictionary definition. The term "immoral takes no meaning from the word "obscene," and the rule of *ejusdem generis* is not invoked. *United States* v. *One Obscene Book Entitled "Married Love,"* 48 F. 2d 821 (D. C., S. D. N. Y., 1931); *United States* v. *One Book Entitled "Contraception,"* 51 F. 2d 525 (D. C., S. D. N. Y., 1931); *United States* v. *One Book Entitled "Ulysses,"* 72 F. 2d 705 (C. C. A., 2d, 1934). In *Parmelee* v. *United States*, 113 F. 2d 729 (App. D. C., 1940), the term "obscene" only was in issue.

In construing the Federal statute directed against the "transportation of any woman or girl for the purpose of prostitution or debauchery, or other immoral purpose", on the other hand, the phrase "other immoral purpose" was held to refer to the same general class or kind as the specified purposes. *United States* v. *Bitty*, 208 U. S. 393; *United States* v. *Lewis*, 110 F. 2d 460 (C. C. A. 7th, 1940), cert. den. 310 U. S. 634; *United States* v. *Hobbs*, 287 F. 157 (D. C., S. D. Fla., 1923). The rule of construction applied there was entirely appropriate, but when applied to Section 122 of the Education Law is contrary to all precedents and make little sense, for, as Judge Desmond of the Court of Appeals, concurring in the affirmance, noted:

> "If it meant, in our statute, sexually vicious only, the word 'immoral' would be tautological and repetitious, since it is there coupled with 'obscene' and 'indecent'. And why should our Legislature have placed a ban on one kind, only, of immorality?" (R 70)

It is clear that the terms "immoral" and "tend to corrupt morals" are words of far vaguer and undefined import than the word "obscene". As Judge Dye observed in his dissenting opinion below (R 80, 81):

> "The term 'immoral' when not connected with 'obscene'—and here it is not—for indeed the motion picture 'La Ronde' was not banned upon the ground of obscenity—has a variety of meanings varying according to time, geography and to some extent, subjective judgment, (Cardozo, Paradoxes of Legal Science: *Matter of Foy Productions* v. *Graves*, 253 App. Div. 475; *Parmelee* v. *United States*, 113 F. 2d 729; *United States* v. *Kennerley*, 209 F. 119). The lexicographers have defined 'immoral' as the opposite of moral (Oxford Dictionary) which term may and does include illicit sexual behavior (Funk & Wagnalls) but the meaning is not limited to sex impurity but includes in addition offenses hostile 'to public welfare' (Black's Law Dictionary), 'inimical to rights or . . . interests of others,' 'corrupt,' 'depraved' and sometimes 'unprofessional' conduct or (42 C. J. S., pp. 395-396), to state it broadly, anything *contra bonos mores*.
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> "To strike the term 'immoral' and the words 'tend to corrupt morals' from the statute as indefinite and undefinable will work no serious result. For years New York State has had statutes dealing with obscenity and indecency broad enough to sanction 'after the fact' criminal prosecution and punishment, application of which has successfully regulated the publication and sale of books and periodicals without prior censorship (Penal Law, § 1141; *cf. Winters* v. *New York, supra*), as well as statutes sanctioning the punishment of persons presenting obscene, indecent, immoral or impure drama, plays or exhibition shows or entertainment (Penal Law, § 1140-a).

"In addition, the word 'obscene,' when compared with the word 'immoral' has a clear and authoritative judicial definition. The Federal standard is whether the book taken as a whole has a 'libidinous effect' (*Hannegan* v. *Esquire, Inc.*, 327 U. S. 146; *United States* v. *One Book Entitled Ulysses*, 72 F. 2d 705, *supra*). In New York the test is 'whether the tendency of the [work] is to excite lustful and lecherous desire' (*People* v. *Wendling*, 258 N. Y. 451, 453; *People* v. *Eastman*, 188 N. Y. 478, 480; *People* v. *Muller*, *supra*). Under this definition 'La Ronde' is certainly not 'obscene.' It has been condemned only on the ground that it is 'immoral' and that its presentation 'would tend to corrupt morals.' . . ."

The attempt in the Froessel opinion to give definiteness to the term by holding it to mean sexual immorality must fail, for the Court may not supply the legislative omission of standards by judicial fiat under the guise of adjudication (see R 79).

Confining the terms of the statute to sexual immorality still leaves too indefinite a standard for constitutionality. Assuming, but not conceding, that the terms "immoral" and "tend to corrupt morals" as used in Section 122 are limited to sexual immorality, the statute would still fail because of indefiniteness. The meaning given to the terms by the Froessel opinion makes them synonymous with "obscene." They are obviously not intended to be synonymous with "obscene" in the statute for then they would be superfluous; moreover neither the Regents nor any of the state courts found "La Ronde" to be "obscene." The words thus mean something other than "obscene", and even if applicable only to "sexual immorality", the statute fails to provide any definite objective standards for the guidance of the censors. What is sexually moral is left to the conscience of the community, an ephemeral basis for determination, and in *Johnson* v. *United States*,

186 F. 2d 588, 590 (C. A. 2d, 1951), Judge Learned Hand adverted to the possibilities of injustice which the vague nature of the concept "good moral character" entails. See, too, *Schmidt* v. *United States*, 177 F. 2d 450, 451, 452 (C. A. 2d, 1949).

In the *Burstyn* case, the New York censorship statute was struck down as invalid as to the term "sacrilegious" because, among other reasons, the term was vague and indefinite. So, too, the standard of whether the film was prejudicial to the "best interests" of a city was held to be indefinite (*Gelling* v. *Texas*, *supra*). The New York statute is no more clearly drawn as to the meaning of "immoral" or "tend to corrupt morals". No standards are set forth in the statute; no standards have been supplied by the rules of the Regents; the courts have fixed no meaning; the terms have taken on no meaning from use or experience, and the statute is fatally defective because of indefiniteness.

POINT III

Assuming that censorship is constitutional and that the terms in issue are not indefinite, the statute as applied to "La Ronde" violates the First Amendment and the due process clause of the Fourteenth Amendment, for "La Ronde" is not, in fact, "immoral".

This Court may make an independent examination of "La Ronde" to determine whether its exclusion from public view deprives Appellant of liberty and property rights in contravention of the due process clause of the Fourteenth Amendment and violates the First Amendment. It is not bound by the conclusions of the Regents or courts below. *E. g.*, *Niemotko* v. *Maryland*, 340 U. S. 268, 271; *Norris* v. *Alabama*, 294 U. S. 587, 589, 590. See dissenting opinion of Judge Dye below (R 74) and au-

thorities there cited. As Mr. Justice Reed stated in his concurring opinion in the *Burstyn* case (p. 506):

> "Assuming that a state may establish a sytem for the licensing of motion pictures, an issue not foreclosed by the Court's opinion, our duty requires us to examine the facts of the refusal of a license in each case to determine whether the principles of the First Amendment have been honored. This film does not seem to me to be of a character that the First Amendment permits a state to exclude from public view."

"La Ronde" was admitted through Customs without objection; it has been widely exhibited in principal cities of the civilized world and has been exhibited in over 100 cities in some 24 States in this country. It has won prizes as the best film in three International Film Festivals—Venice, Cannes and Brussels—(R 38) and it was an Academy Award nominee for screen-play and art direction (R 45, 46). The prevailing opinion in the Appellate Division sustaining the Regents, conceded "there have been high evaluations of it by reputable critics" (R 50). The concurring opinion of Judge Desmond in the Court of Appeals for affirmance said that "we agree with appellant's counsel that it 'has a distinguished cast and a brilliant production' . . ." (R 67).

To determine whether this motion picture is immoral, the opinions of qualified critics are relevant. *United States* v. *Ulysses*, 72 F. 2d 705, 708 (C. C. A. 2d, 1934). In its wide exhibition "La Ronde" has received exceedingly favorable comment of outstanding dramatic critics.

Thus, in December 1951, Theatre Arts said (R 38, 40):

> "A sensation in Europe, where it received the highest awards at the Venice, Cannes and Brussels film festivals, and shown successfully since its completion in 1950 on the Continent, in England and in

South America, 'La Ronde,' a film version in French of the famous Arthur Schnitzler comedy 'Reigen,' is at this writing to be seen only in Los Angeles and in Washington, D. C. in this country. The New York State censors have, at the moment, refused it a license but since the morals of picture goers have not apparently been appreciably impaired at either the Federal or the film capital, its sponsors are optimistic about a lifting of the ban."

* * * * *

"The subject matter, in the hands of a lesser artist than Schnitzler, might very well have become sordid, furtive, dreary, offensive. But the line of good taste in 'Reigen' is never transgressed. The point of view is adult and civilized. The detachment, the fastidiousness, the graceful discretion of the playwright bring to even the most comic aspect of the piece a disenchantment and a mournfulness, create a mood of mingled absurdity and pathos, of mirth and melancholy that, in spite of the groans of the moraltists, is most unlikely to tempt even the lowest grade moron to venture on to the primrose path."

The Saturday Review of Literature of November 10, 1951 (R 37, 38) stated:

"I have been a little disappointed in the recent crop of pictures from France, but now my faith in the French film has been pleasantly bolstered by the arrival of 'La Ronde,' a delightful adaptation of Arthur Schnitzler's 'Reigen.' Max Ophuls, a director known to Hollywood as well as the Continent, has worked some minor miracles in turning this wry Viennese comedy into a movie for the adult film-goer. He first of all has assembled a splended and glittering cast that includes Anton Walbrook, Gerard Philipe, Isa Miranda, Dannielle Darrieux, Daniel Gelin, Simone Simon, Jean-Louis Barrault, Fernand Gravet, and

Odette Joyeux. Their turns before the camera are not long, but their portrayals have the quality of nuance that makes a second viewing almost obligatory. In addition to that Ophuls has frankly admitted the artificiality of Schnitzler's 'round of love' and has made it work to his advantage by showing you, now and then, the cameras and the sound stage that provide the allusions, by bringing actors on and off, and by, in a sense, spoofing the whole business of worldly seduction. The required light touch is always there, and one always senses the humor of the director while appreciating the wit of the playwright.

"It's more sad than bitter, more ironic than funny, and there's some haunting little message underneath it all, though, to be sure, you are never quite told what it is. I enjoyed every minute of it, and thought it delicately done and in excellent taste."

Two justices of the Appellate Division found that the picture was not immoral. Presiding Justice Foster there stated (R 54, 55):

"In the present case the film in question is certainly not obscene. It has been condemned on the ground that it is 'immoral' and its presentation 'would tend to corrupt morals.' True it deals with illicit love, usually regarded as immoral. But so is murder. The theme alone does not furnish a valid ground for previous restraint. As to its presentation corrupting the morals of the public, this issue is highly debatable. The record indicates a vast body of informed opinion to the contrary. Under such circumstances the action of the Regents impinges on petitioner's constitutional rights of free expression."

In his dissent in the Court of Appeals Judge Dye quoted with approval the opinions of critics that praised "La Ronde." Even the Director of the Motion Picture Division of the New York Education Department, Dr.

Hugh M. Flick, indicated approval of "La Ronde" in a published interview appearing in the "Saturday Review" of November 22, 1951.[27]

Thus, there is a large and respectable segment of public opinion that would not regard "La Ronde" as immoral. To permit the state to ban the showing of such a picture would sanction the suppression in advance of any film dealing with a controversial theme, and would thereby clearly encroach on the freedom of expression guaranteed by the First Amendment.

Freedom of expression, this Court has said, is the rule, and there is a heavy burden on the State to show that an exception should be read into the constitutional mandate, or that a particular motion picture should be excluded from its coverage. In the Appellate Division the majority of that Court followed the "substantial evidence" test, which this Court had repudiated in the *Burstyn* case, as not applicable in the field of civil rights. Thus, the Appellant whose rights were infringed had the almost impossible task of demonstrating that there was no basis whatsoever for the Regent's rejection. In his dissent, Appellate Division Justice Foster commented on the limited power of review over the Regents and said (R 54):

> "Thus if the issue is debatable, the action of the administrative body is uniformly upheld. As applied to censorship, and apply it we must if the statute in question is a valid one, such a rule would seem fallacious. In dealing with an issue of free expression the rule should be quite to the contrary, and the determination of any board or bureau should only be upheld where it is clear that any conclusion to the contrary would not be entertained by any rea-

[27] See pp. 21, 52 and 53 where Dr. Flick states that "La Ronde" is a well-meant and well-made movie and that "under a reinterpretation of the law and under controlled conditions 'La Ronde' might be shown".

sonable mind. It is wholly inconsistent with a constitutional guarantee to leave any debatable issue of morals, involved in any form of protected expression, to the final decision of an administrative agency. Since a constitutional issue is involved litigants should be entitled to the independent judgment of a competent court after the event" (R 54).

The Court of Appeals took the position that it would not substitute its judgment for that of the Regents and that "no constitutional argument can be presented for having it otherwise" (R 65). In effect, then, the New York courts have imposed the burden of proving the film should be licensed on the proponent of the film.

It is submitted that the theme of "La Ronde" is that transient affairs like those depicted are essentially pathetic, and far from tending to corrupt morals, it impresses upon the viewer the futility of fleeting relationships. If there is doubt that "La Ronde" is immoral, that doubt should be resolved in favor of permitting the motion picture to be shown. The favorable reviews and comment on the film, the fact that where shown it has produced no complaint or incident or had any apparent effect on the morals of the viewers, lead to the conclusion that the Regents have not met the burden of proof necessary to ban "La Ronde."

In the application of the terms "immoral" and "tend to corrupt morals" the Regents have not been consistent. In this case they found the film objectionable because it deals with illicit love. The law never intended to permit censorship of a theme, a subject. It is the treatment of the theme that counts. *People* v. *Wendling*, 258 N. Y. 451, 455.

The error the Regents fall into in dealing with the term "immoral" is pointed up by their licensing many films which deal with illicit love or other illicit matter. For example, the themes of the following licensed pictures

illustrate the inconsistency of the rulings of the Regents: "Place in the Sun", which is the Dreiser story "American Tragedy", dealing with illicit love and murder; "Rashomon", concerning the rape of a wife; "Devil in the Flesh", illicit love and pregnancy; "Streetcar Named Desire", illicit love; "Young Wives Tale", illicit love; "Kind Hearts and Coronets", dealing with a sequence of murders; "Manon", illicit love; "Dedee", illicit love; "Savage Triangle", story of a prostitute; "Miss Julie", illicit love; "Seven Deadly Sins", illicit love; "The Strange Ones" ("Les Enfants Terribles"), incest; "Fanfan de Tulipe", illicit love; "Anna", illicit love; "Rome 11 o'clock", illicit love and prostitution; "No Orchids for Miss Blandish", rape and drugs; "The Sinners", illicit love; "Captain's Paradise", bigamy; "Three Forbidden Stories", drugs and illicit love; "The Moon is Blue", banned in New Jersey and Maryland; "M", banned in Ohio were licensed in New York.

The approval of the films listed particularly those involving illicit love, reflects the basic indefiniteness of the statute, the want of administrative standards and lack of judicial guides to apprize the distributor of what may be approved and what may be banned. This discriminatory statute barred the exhibition of "La Ronde" for two years during which the distributor received no return on his investment in New York, the most important market in this country for foreign films.

If this case were an appeal from a conviction for distributing an immoral motion picture, the facts and circumstances under which it had been exhibited would form the context in which this Court could examine the question of whether the exhibitor could be punished for showing the picture. The test there would be whether the exhibition presented clear and present danger to the morals of the community. But this is not the situation which this appeal presents. Here, "La Ronde" was excluded from the screen on the claim that its exhibition, under hypothetical condi-

tions and circumstances, would present a clear and present danger to the morals of the community. In short, the difference between the application of the sanction of subsequent punishment and that of previous restraint, represents the difference between an objective, after the fact, determination that a particular picture, in special circumstances and under particular conditions, represents a clear and present danger to the morals of the community, and the subjective, *a priori* concept of the censors that "La Ronde" "might", if exhibited under certain hypothetical circumstances and conditions, constitute a clear and present danger to the morals of the community.

This case involves not merely the rights of appellant but the right of the public to view such films as they see fit. The evils apprehended by those who would suppress this film are far less dangerous to the community than the vice and danger inherent in banning the free expression and communication of ideas.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the determination of the Regents annulled, and "La Ronde" should be permitted to be exhibited in New York State.

Respectfully submitted,

FLORENCE PERLOW SHIENTAG,
Attorney for Appellant,
19 East 53rd Street,
New York 22, N. Y.

FLORENCE PERLOW SHIENTAG,
PHILIP J. O'BRIEN, JR.,
ROSE M. TRAPANI,
Of Counsel.

APPENDIX A

Article I, Section 8 of the New York Constitution states:

Every citizen may speak freely, write, publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

New York Education Law

Article 3, Part I—General Provisions

§ 101. Education department, regents of the university

There shall continue to be in the state government an education department * * * The head of the department shall continue to be the regents of The University of the State of New York, who shall appoint, and at pleasure may remove, the commissioner of education. The commissioner shall continue to be the chief administrative officer of the department * * *.

Article 3, Part II—Motion Picture Division

§ 120. Motion picture division continued; organization

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix

the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

§ 121. Local offices and bureaus

The regents may authorize the establishment and maintenance of offices and bureaus for the reception and examination of films and for the transaction of the business of the division in such places as efficiency, economy and the public interests require.

§ 122. Licenses

The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.

§ 123. Permits

1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

2. Scientific and educational films. Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character in-

tended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

§ 124. Review by regents

An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall be reviewable by a proceeding under article seventy-eight of the civil practice act at the instance of the applicant.

§ 125. Permits revocable

Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such

director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such director or authorized officer only in the manner provided for license.

§ 126. Fees

The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a fee of three dollars for each one thousand feet or fraction thereof of original film and two dollars for each additional copy thereof licensed or permitted by him. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York.

§ 127. Applications

No license or permit shall be issued for any film unless and until application therefor shall be made in writing in the form, manner and substance prescribed by the education department, and accompanied by the required fee. Such application shall immediately be given a serial number which shall by the producer, owner or applicant be made a permanent part of the principal title portion of the corresponding film and every copy thereof for which the permit or license is applied, in such style and substance as such department shall prescribe.

§ 128. Licenses and permits void

Any license or permit issued upon a false or misleading affidavit or application shall be wholly void ab initio. Any change or alteration in a film after license or permit, ex-

cept the elimination of a part or except upon written direction of the director or authorized officer of such division, shall be a violation of this article and shall also make immediately void the license or permit therefor. A conviction for a crime committed by the exhibition or unlawful possession of any film in the state of New York shall per se revoke any outstanding license or permit for said film and such director or authorized officer shall cause notice thereof to be sent to the applicant or applicants.

§ 129. Unlawful use or exhibition

It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

§ 130. Posters, banners, et cetera

No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such a character that its exhibition would tend to corrupt morals or incite to crime. If such poster, banner or similar ad-

vertising matter is so exhibited or offered to another for exhibition, it shall be sufficient ground for the revocation of any permit or license issued by the education department.

§ 131. Penalty

A violation of any provision of part two of this article shall be a misdemeanor.

§ 132. Enforcement; rules and regulations

The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace office in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations.

* * * * *

Rules and Regulations for Review and Licensing of Motion Pictures, issued by the Board of Regents of the University of the State of New York

Motion Pictures

The Motion Picture Commission was originally created by an act of the Legislature known as chapter 715 of the Laws of 1921. This commission functioned until January 1, 1927, when under the provisions of the State Departments Law the activities of this commission were transferred to the State Education Department. A Motion Picture Division was created and the Board of Regents was authorized to assign to such Division all the powers, duties and functions of the aforesaid commission. . . . (The

Appendix A

University of the State of New York Education Department, Handbook No. 38, Page 3, Jan. 1, 1952.)

Regents Rules

§ 237 ***Examination of films.*** **1 All films to be released within the State of New York on or after January 1, 1927, shall be presented for examination to the Motion Picture Division at such times and places as it may designate. The applicant shall fill out a blank furnished by the Division, which shall contain the name and address of the applicant and be a statement or an affidavit as the Director of the Division may require.**

2 The application shall contain a statement of the title of the film, the manufacturer and the exchange handling the film, the number of reels and the total length of the picture, and a statement of the number of duplicates or prints of the film to be used in the State of New York. It shall also contain a brief description of the film, with a classification as to whether it is a comedy or drama, the date of manufacture, the date of release and the names of the leading characters in the film. There shall also be embodied in the application an agreement that the duplicates applied for are exact copies of the original film and that all eliminations or changes directed by the Division will be made before the film is released in the State of New York.

Applications for licenses for films in which all or a part thereof is to be exhibited in conjunction with any mechanical device for the reproduction of sound or language, or by the use of persons for the utterance of language, must be accompanied by an exact transcription of such language. When the dialogue used in conjunction with such films is in a foreign language, an exact transcription into English must be submitted with the application.

3 Each application for examination shall be filed with the Division at its office in the city of New York, or elsewhere, if required, at least one week before the date fixed for the release.

4 Each application shall be accompanied by a money order or certified check drawn to the order of the Department, Motion Picture Division, for the amount of the fee required by law to be paid.

5 At the time of making the application for a license or permit, the Division will give to each film, and to each duplicate or print thereof, a serial number which shall be included in the identification matter required to be exhibited with the film as provided by these rules.

6 All banners, posters or other advertising matter used in connection with the film, shall, when requested by the Director, be submitted to the Division for examination.

(Handbook 38, *supra*, pp. 13-15.)

§ 242 *Unlawful use or exhibition.* It shall be unlawful to exhibit any film in the State of New York unless there shall be exhibited with the same as required by these rules and regulations the seal and serial number accompanied by the identification words showing the granting of a permit or license, and it shall be unlawful to detach and exhibit a portion of any film for which a license or permit has been granted, without the exhibition of the seal, serial number and words accompanying the same. It shall be unlawful to use any portion of the leader upon a film other than the one for which it was issued.

(Handbook 38, *supra*, p. 23.)

§ 244 *License or permit to be refused in certain cases.* No motion picture shall be licensed *or a permit* granted for

its exhibition within the State of New York the whole or any part of which is obscene, indecent, immoral, inhuman, sacrilegious, or of such a character that its exhibition would tend to corrupt morals or incite to crime.

(Handbook 38, *supra*, p. 24.)

Standards of the Motion Picture Division

As Fixed by Law

No motion picture will be licensed or a permit granted for its exhibition within the State of New York, which may be classified, or any part thereof, as *obscene, indecent, immoral, inhuman, sacrilegious, or which is of such a character that its exhibition would tend to corrupt morals or incite to crime.*

(Handbook 38, *supra*, Back Cover.)

APPENDIX B

The following grounds were stated by the Regents for their denial of licenses in the cases listed, with no supporting statement of facts or reasoning:

Title of Film	*Grounds for Rejection*	*Citation*
The Naked Truth	obscene, indecent, tends to corrupt morals	37 St. Dept. 210 (1927)
The Road to Ruin	indecent, obscene, tends to corrupt morals and to incite to crime	38 St. Dept. 195 (1928)
High Treason	inhuman, tends to incite to crime	39 St. Dept. 449 (1930)
Chained	indecent, immoral, will tend to corrupt morals	50 St. Dept. 9 (1934)
Pace That Kills	indecent, immoral, will tend to corrupt morals	55 St. Dept. 431 (1936)
Sangen om den Eldroda Blomman (Song of the Scarlet Flower)	indecent, immoral, will tend to corrupt morals	55 St. Dept. 462 (1936)
Ecstasy	indecent, immoral, will tend to corrupt morals	55 St. Dept. 551 (1936)
Tomorrow's Children (Revised)	immoral, will tend to corrupt morals and will tend to incite crime	57 St. Dept. 422 (1937)
Dr. Knock	indecent, immoral, will tend to corrupt morals	57 St. Dept. 350 (1937)
How to Undress	indecent, immoral, will tend to corrupt morals	58 St. Dept. 435 (1937)
Nocturno	indecent, immoral, will tend to corrupt morals	58 St. Dept. 507 (1938)

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Title of Film	*Grounds for Rejection*	*Citation*
The Pace That Kills (Third Revision)	indecent, immoral, will tend to corrupt morals	60 St. Dept. 25 (1938)
Souls for Sale	immoral, will tend to corrupt morals	60 St. Dept. 26 (1938)
Human Wreckage	indecent, immoral, will tend to corrupt morals	60 St. Dept. 62 (1938)
Sunset Murder Case	indecent	60 St. Dept. 183 (1939)
Polygamy	immoral, sacrilegious, will tend to corrupt morals and to incite to crime	60 St. Dept. 217 (1939)
Have You Nothing to Declare?	indecent, immoral, will tend to corrupt morals	64 St. Dept. 44 (1940)
Life on the Hortobagy	indecent, immoral, will tend to corrupt morals	64 St. Dept. 55 (1941)
He	indecent, immoral, will tend to corrupt morals	64 St. Dept. 117 (1941)
They Must Be Told	indecent, immoral, will tend to corrupt morals	64 St. Dept. 162 (1941)
The Outlaw	indecent, immoral, will tend to corrupt morals	64 St. Dept. 216 (1942)
Miracle of Life	indecent	64 St. Dept. 242 (1942)
The Outlaw	indecent, immoral, will tend to corrupt morals	64 St. Dept. 246 (1942)
The Egomaniac	indecent, immoral, will tend to corrupt morals and to incite to crime	64 St. Dept. 253 (1942)

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Title of Film	*Grounds for Rejection*	*Citation*
Child Bride	indecent, immoral, inhuman, will tend to corrupt morals and to incite to crime	65 St. Dept. 157 (1944)
Going My Way, Mister?	indecent, immoral, will tend to corrupt morals	65 St. Dept. 177 (1944)
Amok	indecent, immoral, will tend to corrupt morals and to incite to crime	67 St. Dept. 39 (1946)
Ecstasy	indecent, immoral	68 St. Dept. 72 (1947)

In the following cases, the determination of the Motion Picture Division to deny a license was reversed, without any reason being stated by the Regents:

Title of Film	*Citation*
Barretts of Wimpole Street	50 St. Dept. 10 (1934)
Harvest	62 St. Dept. 43 (1939)
Kidnapping Gorillas	64 St. Dept. 56 (1941)
Sunset Murder Case	64 St. Dept. 132 (1941)

Appendix B

In the following cases, revisions were held to have met the objection previously raised, again without further clarification by the Regents:

Title of Film	*Citation*
Damaged Lives	57 St. Dept. 335 (1937)
Yes, My Darling Daughter	60 St. Dept. 164 (1939)
Ecstasy	64 St. Dept. 36 (1940)
Fools of Desire	64 St. Dept. 37 (1940)

In the following cases, a brief factual summary of the plot preceded a determination to deny a license to the film upon the statutory ground stated, without further elaboration by the Regents:

Title of Film	*Statutory Ground of Objection*	*Citation*
This Naked Age	indecent, will tend to corrupt morals	43 St. Dept. 105 (1933)
Narcotic	immoral, indecent, tends to corrupt morals and to incite to crime	46 St. Dept. 208 (1933)
Jeanne	indecent, immoral, will tend to corrupt morals	55 St. Dept. 415 (1936)
The Puritan	indecent, immoral, will tend to corrupt morals and to incite to crime	60 St. Dept. 163 (1939)

Appendix B

Analytical opinions were written only in the following cases:

Title of Film	*Citation*
The Mystery of Life	41 St. Dept. 229 (1931)
The Last Will of Dr. Mabuse	52 St. Dept. 71 (1935)
False Shame	58 St. Dept. 441 (1937)
The Birth of a Baby	58 St. Dept. 459 (1937)
Assassin of Youth	60 St. Dept. 21 (1938)
Wild Weed	70 St. Dept. 99 (1949)
Mom and Dad	70 St. Dept. 41 (1949)

The Regents referred to a prior opinion of their own only in the two cases of "False Shame" and "Mom and Dad." "Wild Weed" is the only case in which a judicial precedent was cited.